A

OWI CHENG IAN

v.

SURUHANJAYA PASUKAN POLIS DIRAJA MALAYSIA & ORS

B

COURT OF APPEAL, PUTRAJAYA
SYED AHMAD HELMY JCA
ABDUL WAHAB PATAIL JCA
MOHAMAD ARIFF YUSOF JCA
C [CIVIL APPEAL NO: W-01-672-2010]
15 APRIL 2014

ADMINISTRATIVE LAW: *Exercise of administrative powers - Dismissal from service - Disciplinary authority - Power of delegation -*
D *Whether correct quorum sat as disciplinary authority - Whether police force commission legally appointed - Whether there was procedural unfairness - Date of dismissal - Whether stated - Whether dismissal incomplete - Whether officer given right to be heard - Whether charge defective - Federal Constitution, arts. 135(2), 140(1) & (3)*

E

ADMINISTRATIVE LAW: *Rules of natural justice - Dismissal - Right to be heard - Whether fundamental to natural justice - Whether reasonable opportunity to be heard given - Federal Constitution, art. 135(2)*

F

CONSTITUTIONAL LAW: *Public servants - Dismissal - Right to be heard - Whether denied - Whether reasonable opportunity to be heard given - Procedural fairness - Whether adhered to - Federal Constitution, art. 135(2) - Whether appellant reinstated*

G

The appellant, a chief inspector, had been dismissed from the police force. Asserting that the authority did not adhere to the procedural requirements and that his dismissal ought to be set aside, the appellant filed an application for judicial review to the High Court. However, his application was dismissed. Hence, this
H appeal. The submissions forwarded by the appellant were in relation to, *inter alia*, (i) the authority of the quorum that sat as the disciplinary authority ('the first issue'); (ii) the fact that the show cause letter and the 'surat pemberitahuan hukuman tatatertib' ('the two letters') were signed by the Setiausaha
I Suruhanjaya Pasukan Polis ('the second issue'); (iii) the date of commencement of the decision as it was not stated in the 'surat pemberitahuan hukuman tatatertib' ('the third issue'); (iv) the fact

that the appellant was denied an opportunity to be heard in his defence ('the fourth issue'); and (v) whether the charges against him was defective ('the fifth issue'). A

Held (allowing appeal; setting aside decision of High Court) Per Abdul Wahab Patail JCA delivering the judgment of the court: B

(1) The proviso to art. 140(1) of the Federal Constitution refers to Parliament taking steps of providing for the exercise of disciplinary control. However, the Instrument of Delegation of Certain Functions PU(B) 441/2000 is not a legislation by Parliament under the proviso but an act of delegation by the police force commission under the powers authorised *vide* art. 140(3). Hence, there was no merit in the first issue. (paras 12, 13 & 14) C D

(2) The two letters showed that they were the letterheads of the Setiausaha Suruhanjaya Pasukan Polis, and in the absence of evidence to the contrary, it was sufficient to prove, upon a balance of probabilities, that they were issued by the Setiausaha Suruhanjaya Pasukan Polis. Hence, there was no merit in the second issue. (paras 17 & 18) E

(3) The decision of the disciplinary authority ought to have precisely stated as to when it intended the punishment of dismissal to operate from. It was important as it would impact the payments, if any, which the appellant was entitled to receive. Such date could not be assigned by other than the disciplinary authority. Without specifying the date, the dismissal was incomplete and therefore defective. Hence, the third issue had merit. (paras 21 & 22) F G

(4) Article 135(2) of the Federal Constitution requires that reasonable opportunity be given to be heard. What is reasonable must be determined by the nature of the matter at issue and to be heard. The right to be heard is a right fundamental to natural justice. It gives an opportunity for a party to provide explanation against an accusation. On the facts, the process to ensure procedural fairness as required by art. 135(2) had not been adhered to. As such, the appellant had been denied an opportunity to be heard in his defence. Hence, the fourth issue had merit. (paras 26, 27, 28 & 35) H I

(5) The purpose of a charge is similar to the purpose of a pleading. It is to make clear to the other party what was the case being made out against him. Similar to a pleading, it was not necessary to plead evidence in a charge. As such, the charge was not defective, although the appellant may not know of all the evidence against him. Hence, there was no merit in the fifth issue. (paras 32 & 33)

Bahasa Malaysia *Translation Of Headnotes*

Perayu, seorang yang berpangkat ketua inspektor, telah dibuang kerja daripada perkhidmatan pasukan polis. Menegaskan bahawa pihak berkuasa tidak mematuhi kehendak prosedur dan bahawa pembuangan kerjanya sepatutnya diketepikan, perayu telah memfailkan satu permohonan semakan kehakiman di Mahkamah Tinggi. Walau bagaimanapun, permohonannya ditolak. Oleh itu, rayuan ini. Hujahan yang dikemukakan oleh perayu adalah berkaitan dengan, antara lain, (i) kuasa korum yang menjalankan tugas sebagai pihak berkuasa tatatertib ('isu pertama'); (ii) fakta bahawa surat tunjuk sebab dan surat pemberitahuan hukuman tatatertib ('kedua-dua surat') telah ditandatangani oleh Setiausaha Suruhanjaya Pasukan Polis ('isu kedua'); (iii) tarikh hukuman perayu berkuatkuasa memandangkan ia tidak dinyatakan dalam surat pemberitahuan hukuman tatatertib ('isu ketiga'); (iv) fakta bahawa perayu tidak diberikan peluang untuk didengar semasa pembelaannya ('isu keempat'); dan (v) sama ada pertuduhan ke atas perayu cacat ('isu kelima').

Diputuskan (membenarkan rayuan; mengenepikan keputusan Mahkamah Tinggi)
Oleh Abdul Wahab Patail HMR menyampaikan keputusan mahkamah:

(1) Proviso kepada per. 140(1) Perlembagaan Persekutuan merujuk kepada Parlimen mengambil langkah untuk menyediakan pelaksanaan kawalan tatatertib. Walau bagaimanapun, Suratcara Perwakilan Tugas-Tugas Tertentu PU(B) 441/2000 bukanlah undang-undang yang dibuat oleh Parlimen di bawah proviso tetapi suatu tindakan perwakilan oleh suruhanjaya pasukan polis di bawah kuasa yang disahkan oleh per. 140(3). Maka, tiada merit dalam isu pertama.

(2) Kedua-dua surat menunjukkan bahawa ia adalah daripada kepala surat Setiausaha Suruhanjaya Pasukan Polis dan tanpa keterangan yang bertentangan, ia adalah mencukupi untuk memutuskan, atas imbangan kebarangkalian, bahawa kedua-dua surat tersebut telah dikeluarkan oleh Setiausaha Suruhanjaya Pasukan Polis. Oleh itu, tiada merit dalam isu kedua.

(3) Keputusan pihak berkuasa tatatertib sepatutnya menyatakan dengan jelas bila hukuman perayu bermula. Perkara ini adalah penting kerana ia akan memberi kesan kepada bayaran, jika ada, yang layak diterima oleh perayu. Tarikh sebegitu tidak boleh diberi oleh pihak lain selain daripada pihak berkuasa tatatertib. Tanpa menyatakan tarikh, pembuangan kerja perayu adalah tidak lengkap dan oleh itu, cacat. Dengan itu, isu ketiga mempunyai merit.

(4) Perkara 135(2) Perlembagaan Persekutuan memperuntukkan bahawa peluang munasabah untuk didengar perlu diberikan. Apa yang munasabah perlu ditentukan melalui sifat hal perkara tersebut. Hak untuk didengar adalah hak asasi kepada keadilan asasi. Ia memberi peluang kepada suatu pihak untuk membekalkan penjelasan terhadap tuduhannya. Berdasarkan fakta, proses untuk memastikan keadilan prosedur seperti dikehendaki oleh per. 135(2) tidak dipatuhi. Oleh itu, perayu telah dinafikan peluang untuk didengar semasa pembelaannya. Maka, isu keempat mempunyai merit.

(5) Tujuan tuduhan adalah sama dengan tujuan pliding. Ia adalah untuk menjelaskan kes yang diambil terhadap suatu pihak. Sama seperti pliding, keterangan tidak perlu dinyatakan dalam tuduhan. Oleh itu, tuduhan adalah tidak cacat, walaupun perayu tidak mengetahui segala keterangan terhadapnya. Maka, tiada merit dalam isu kelima.

Case(s) referred to:
Chief Constable Of North Wales Police v. Evans [1982] 3 All ER 141 ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Berhad [1995] 1 CLJ 609 CA ***(refd)***
Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor [2012] 1 CLJ 448 FC ***(refd)***

Legislation referred to:
Federal Constitution, arts. 135(2), 140(1), (3), (6)(b)
Rules of the High Court 1980, O. 53(1)

A *For the appellant - G Subramaniam Nair (Ebrina Zubir with him); M/s Maniam Nair & Co*
For the respondents - Shamsul Bolhassan (Aida Adhha Abu Bakar with him); SFC

B *[Editor's note: For the High Court judgment, please see Owi Cheng Ian v. Suruhanjaya Pasukan Polis Diraja Malaysia & Yang Lain [2011] 1 LNS 1900.]*

Reported by Kumitha Abd Majid

C

JUDGMENT

Abdul Wahab Patail JCA:

D **[1]** The appellant Owi Cheng Ian appealed to this court against the dismissal on 8 October 2010 by the High Court of his application dated 2 June 2009 under O. 53 of the Rules of the High Court 1980 for judicial review. He obtained leave under O. 53(1) on 13 July 2009, and had sought the following reliefs:

E (a) ... membatalkan keputusan yang telah diberi oleh Suruhanjaya Pasukan Polis DiRaja Malaysia (Responden Pertama) bagi pihak Responden Kedua dan Ketiga pada 11-03-2009 untuk membuang kerja Pemohon dari Pasukan Polis Di Raja Malaysia dan bahawa Pemohon masih merupakan pekerja Responden Ketiga, Kerajaan Malaysia, dan digajikan sebagai
F Ketua Inspektor;

(b) Suatu siasatan untuk menentukan tunggakan gaji, emolumen, elaun-elaun dan faedah-faedah lain yang Pemohon sepatutnya menerima dari tarikh Pemohon ditahan kerja (16-05-2006)
G sehingga 11-03-2009 dan seterusnya dari 12-03-2009 sehingga penyelesaian penuh;

(c) Faedah pada kadar 8% setahun dari 16-05-2006 (tarikh ditahan kerja) sehingga 11-03-2009 dan seterusnya dari 12-03-2009 sehingga penyelesaian penuh;

H (d) Untuk semua Perintah-Perintah yang diperlukan dan berbangkit diberi; dan

(e) Bahawa kos usul ini dan kos yang disebabkan oleh usul ini hendaklah menjadi kos dalam kausa.

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[2] Having heard the parties, we allowed the appeal, and: A

(a) set aside the order of the High Court;

(b) set aside the decision of the Police Force Commission;

(c) ordered that the appellant be reinstated without loss; B

(d) fixed costs in the sum of RM10,000; and

(e) ordered that the deposit be refunded.

[3] In pursuing the appeal, the appellant relied upon the C principles enunciated in:

(a) *Chief Constable Of North Wales Police v. Evans* [1982] 3 All ER 141 (House Of Lords) that judicial review is concerned, not with the decision, but with the decision-making process. D

(b) *Yusof Sudin v. Suruhanjaya Perkhidmatan Polis & Anor* [2012] 1 CLJ 448; [2011] 5 MLJ 465 that no man shall be condemned unheard, and that failure to observe procedural fairness is tantamount to a breach or aiding a breach of a fundamental right, in this case his right to his employment. E

[4] Seven issues were submitted upon before us.

The First Issue

F

[5] The first issue concerns authority of the quorum that sat as the disciplinary authority.

[6] In his affidavit in reply dated 22 February 2010, Dato' Raja Azahar bin Raja Abdul Manap, at para. 7, stated: G

> 7. Selaras dengan Suratcara Perwakilan Fungsi-Fungsi, Kuasa-Kuasa, Tugas-Tugas Dan Tanggungjawab-Tanggungjawab Tertentu [P.U.(B) 441/2000], pengerusi Lembaga-Tatatertib yang dilantik pada masa yang material, mendapati *prima facie* wujudnya pelanggaran tatakelakuan yang boleh menyebabkan tindakan tatatertib diambil terhadap pemohon. H

[7] At para. 11 g. of the same affidavit, he stated:

> g. Perlantikan pengerusi dan anggota Responden Pertama telah dibuat selaras dengan perkara 140(3) Perlembagaan Persekutuan. I

[8] The appellant responded in his affidavit of 12 May 2010 that:

> 13. Perenggan 11(f) dan 11(g) Afidavit Jawapan tersebut adalah dinafikan dan Responden-Responden diletakkan beban bukti yang kukuh untuk membuktikannya.

[9] Article 140(3) of the Federal Constitution provides:

> (3) The Police Force Commission shall consist of the following members, that is to say:
>
> (a) the Minister for the time being charged with responsibility for the police, who shall be Chairman;
>
> (b) the officer of police in general command of the police force;
>
> (c) the person performing the duties of the office of Secretary General to the Ministry under the Minister for the time being charged with responsibility for the police;
>
> (d) a member of the Public Services Commission appointed by the Yang di-Pertuan Agong;
>
> (e) not less than two nor more than six other members, appointed by the Yang di-Pertuan Agong.

[10] Article 140(6)(b) authorises the delegation under the Instrument Of Delegation Of Certain Functions, Instrument Of Delegation Of Certain Functions P.U.(B) 441/2000.

[11] It was submitted, relying on the proviso to art. 140(1) that where a delegation had been made, the Police Force Commission ceased to have authority.

[12] The proviso to art. 140(1) is as follows:

> Provided that Parliament may by law provide for the exercise of such disciplinary control over all or any of the members of the police force in such manner and by such authority as may be provided in that law and in that event, if the authority is other than the Commission, the disciplinary control exercisable by such authority shall not be exercised by the Commission; and no provision of such law shall be invalid on the ground of inconsistency with any provision of this Part.

[13] It refers to Parliament taking the step of providing by law for the exercise of disciplinary control. The Instrument Of Delegation Of Certain Functions, Instrument Of Delegation Of Certain Functions P.U.(B) 441/2000, however, is not legislation by Parliament under the proviso, but an act of delegation by the Police Force Commission under powers authorised under art. 140(3).

[14] We find no merit in the submission on this first issue.

The Second Issue

[15] The second issue is that Peraturan-Peraturan Pegawai Awam (Kelakuan DAN Tatatertib) (Pindaan) 2002 P.U. (A) 246/2002. Regulation 53 thereof reads as follows:

> 53. Apa-apa surat-menyurat antara Pihak Berkuasa Tatatertib yang berkenaan dengan pegawai yang tertakluk kepada tindakan tatatertib hendaklah ditandatangani oleh Pengerusi Pihak Berkuasa Tatatertib yang berkenaan atau oleh mana-mana anggota Pihak Berkuasa Tatatertib bagi pihak Pengerusi.

[16] It was submitted that the show cause letter KKDN(R)/211/1199/1-178 dated 18 September 2007 and the Pemberitahuan Hukuman Tatatertib KKDN(R) 211/1199/1-178 dated 11 March 2009 were signed by Tan Sri Abdul Aziz bin Mohd Yusof as Setiausaha Suruhanjaya Pasukan Polis and Dato' Raja Azahar bin Raja Abdul Manap respectively, the latter without stating his capacity.

[17] Examination of the two letters show clearly these were the letterheads of the Setiausaha Suruhanjaya Pasukan Polis, and in the absence of evidence to the contrary, is sufficient to prove upon a balance of probabilities that they were issued by the Setiausaha Suruhanjaya Pasukan Polis.

[18] We find no merit in the submission on this second issue.

The Third Issue

[19] The third issue is that the date of commencement of the decision was not stated on the Pemberitahuan Hukuman Tatatertib.

[20] The Pemberitahuan Hukuman Tatatertib read as follows:

> Dengan hormatnya saya memaklumkan bahawa Suruhanjaya Pasukan Polis di dalam mesyuaratnya yang ke-74 pada 11.03.2009 selepas menimbang surat representasi tuan bertarikh 20.1.2008 dengan teliti dan saksama telah membuat keputusan seperti berikut:
>
> (a) Tuan didapati bersalah dan dikenakan hukuman Buang Kerja mengikut Peraturan 38 (o) Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (pindaan) 2002 bagi pertuduhan pertama.
>
> (b) Tuan didapati bersalah dan dikenakan hukuman Amaran mengikut Peraturan 38 (a), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (pindaan) 2002 bagi pertuduhan kedua.
>
> (c) Tuan didapati tidak bersalah dan berjaya membebaskan diri daripada pertuduhan ketiga.
>
> (d) Tuan didapati bersalah dan dikenakan hukuman Amaran mengikut Peraturan 38 (a), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 (pindaan) 2002 bagi pertuduhan keempat.

[21] The appellant was served with a copy of the letter nearly two months later on 6 May 2009. Although this third issue was specifically raised by the appellant at para. 10(f) of his affidavit dated 30 May 2009, it was not addressed in the affidavit in reply. The High Court held that the date of termination operates from the date of the decision. With respect, the High Court erred in stopping at that determination. The point is that the determination was made upon litigation. No further litigation should become necessary to determine the details of an order of a disciplinary authority. The point raised is that the Pemberitahuan Hukuman Tatatertib ought to have stated it clearly, reflecting the decision of the disciplinary authority precisely as to when it intended the punishment of dismissal to operate from. It is also important as it impacts upon the payments, if any, the appellant was entitled to receive or even to refund. Such date cannot be assigned by other than the disciplinary authority. Without the date of dismissal being specified, the dismissal was incomplete and, therefore, defective.

[22] We accept there is merit in the third issue.

The Fourth Issue

[23] The fourth issue is failure to accord the right under art. 135(2) of the Federal Constitution to be heard, and failure to give notice of the hearing.

[24] This issue was pleaded at paras. 10(9), 10(h) and 10(n) of the appellant's affidavit, responded to at paras. 10, 11(a), 11(d), 11(8) and 11(f) of the respondent's affidavit in reply and at paras. 8, 9 and 12 the appellant's reply.

[25] Article 135(2) provides:

> (2) No member of such a service as aforesaid shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard:
>
> Provided that this clause shall not apply to the following cases:
>
> (a) where a member of such a service is dismissed or reduced in rank on the ground of conduct in respect of which a criminal charge has been proved against him; or
>
> (b) where the authority empowered to dismiss or reduce in rank a member of such a service is satisfied that for some reason, to be recorded by that authority in writing, it is not reasonably practicable to carry out the requirements of this Clause; or
>
> (c) where the Yang di-Pertuan Agong, or, in the case of a member of the public service of a State, the Ruler or Yang di-Pertua Negeri of that State, is satisfied that in the interests of the security of the Federation or any part thereof it is not expedient to carry out the requirements of this Clause; or
>
> (d) where there has been made against a member of such a service any order of detention, supervision, restricted residence, banishment or deportation, or where there has been imposed on such a member any form of restriction or supervision by bond or otherwise, under any law relating to the security of the Federation or any part thereof, prevention of crime, preventive detention, restricted residence, banishment, immigration, or protection of women and girls:
>
> Provided further that for the purpose of this Article, where the service of a member of such a service is terminated in the public interest under any law for the time being in force or under any regulation made by the Yang di-Pertuan Agong under Clause (2) of Article 132, such termination of service shall not constitute dismissal whether or not the

A decision to terminate the service is connected with the misconduct of or unsatisfactory performance of duty by such member in relation to his office or the consequences of the termination involved an element of punishment; and this proviso shall be deemed to have been an integral part of this Article as from Merdeka Day.

B

[26] We note that art. 135(2) requires that reasonable opportunity be given of being heard. What is reasonable must be determined by the nature of the matter at issue and to be heard. Proviso (b) provides an exception only where it is not practicable C to carry out the requirements of art. 135(2), and in such case only if it is satisfied of the reason and that it is recorded in writing. We found no such record of any reason why it is not reasonably practicable to carry out the requirements of art. 135(2).

D **[27]** The right to be heard is a right fundamental to natural justice, giving a party an opportunity to give an explanation against an accusation or evidence to be taken into consideration against him. Some of these may by their very nature be adequately dealt with by a written representation. In the absence of clear E explanation why for example, the CCTV recording need not be viewed by the appellant together with the disciplinary authority to enable him to give an explanation, it is difficult to reject the assertion that he had been denied an opportunity to be heard in his defence.

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[28] We hold there is merit in this fourth issue.

The Fifth Issue

[29] The fifth issue pertains to the appellant's denials of the G accusations of misconduct made against him. If a person had not been afforded an opportunity to address the evidence relied upon to form the basis of facts for the accusations against him, it is difficult to hold safely that no injustice had occurred.

H **[30]** We hold there is merit in this fifth issue.

The Sixth Issue

[31] The sixth issue raised is as to charges being defective for various reasons.

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[32] The purpose of a charge is similar to the purpose of a pleading. It is to make clear to the other party what is the case being made out against him. It is not necessary in a pleading to

plead the evidence. Likewise in a charge. No further and better particulars appear to have been previously sought and denied. Though the appellant may not know of all of the evidence against him, that is another issue, but is not a defect of the charge as asserted in this sixth issue.

[33] We find no merit in this sixth issue.

The Seventh Issue

[34] The seventh issue is as to *mala fide*. It was submitted that the appellant had pleaded *mala fide* at paras. 10(o)(i)-10(o)(iv), and that it was established, relying upon *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609; [1995] 1 MLJ 281 CA, when the respondents failed to reply or to deny it specifically. Any such inference is not merely a matter of discretion, but is an exercise of judgement, and cannot be made perfunctorily. Taking into consideration the entire facts of the case and the parties, we find the submission wholly without merit.

Conclusion

[35] For the foregoing reasons, we concluded that the processes to ensure procedural fairness as required by art. 135(2) had not been adhered to, that the decision of the disciplinary authority was incomplete, and tainted with injustice.